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No. 631

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APR 29 1954
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Supreme Court of the United States

OCTOBER TERM, 1953

NORTHWEST STEEL ROLLING MILLS, INC., a Washington Corporation, VERNON A. GENT and HENRY M. RICHARDSON, Petitioners,

vs.

CHARLES H. KENDALL, Assistant Director, Office of Defense Mobilization.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

REPLY BRIEF OF PETITIONERS

EGGERMAN, ROSLING & WILLIAMS,
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AVAILABILITY OF ADMINISTRATIVE INTERPRETATION

Respondent relies heavily on the petitioners' failure to obtain an official interpretation from OPS as to the meaning of CPR 5. Apparently it is the position of respondent that because Price Procedural Regulation 1 (17 F.R. 3787) permitted those subject to price regulations to obtain official interpretations as to the meaning thereof, the Administrator's duty (to promulgate regulations which clearly and unambiguously advised those subject thereto as to the conduct which would result in criminal penalties) was somehow less stringent than the duty which the courts have imposed upon legislative bodies in the enactment of penal statutes. The respondent's theory that administrative regulations are

less strictly subject to the constitutional inhibitions against vague and indefinite legislation is fortunately not the law.

In *M. Kraus & Bros. v. United States,* 327 U.S. 614, 90 L.ed. 894, this court was concerned with revised Maximum Price Regulation 269 promulgated under the Emergency Price Control Act of 1942. The question there was whether "combination sales" and "tying agreements" were within the inhibition of Section 1429.5 of the Regulation. Mr. Justice Murphy said at page 898 of the Law Edition Opinion (327 U.S. 621):

> "This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. * * * A Prosecutor in framing an indictment, a court in interpreting theAdministrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. *Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language.* The prohibited con-

> duct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability." (Italics added)

Respondent's contention that the Director of Price Stabilization or his "District Counsel" could somehow breath life into an unconstitutionally vague and indefinite regulation is clearly erroneous. It might as well have been argued in the *Kraus* case that the defendants' failure to inquire in advance whether their "combination sales" amounted to a violation of the Regulation deprived them of the right to later challenge the vague and indefinite language of the Regulation itself. An administrative regulation (as is the case with any penal statute) must set forth clearly on its face that conduct which will result in criminal liability.

Nor does the single case cited by respondent support his position. In *Taylor v. Porter,* 156 F.(2d) 805 (E.C.A.), cited page 6 of respondent's brief, the court was confronted with rent regulations which contained provisions authorizing those subject thereto to submit to the Administrator *questions of fact* for determination in ascertaining which provisions of a *clear and unambiguous* regulation were applicable to rented premises. The court stated at page 810:

> "We find no ambiguity in the sections of the Regulation to which the complainant directs his attack. * * * The real issue is not as to the clarity of the Regulation, but rather whether the contract with Mrs. Flynn was effective to change the character of

the apartment from fully furnished to unfurnished and whether the installation of the laundry equipment was in fact a major capital improvement."

The Emergency Court of Appeals commented upon the failure of the complainant to submit to the Administrator the *factual* question for determination. It did not, as respondent would have this court believe, sustain an otherwise vague regulation because of the availability of "official interpretations" as to the meaning of the regulation itself.

Respondent's position here is not that petitioners should have obtained a *factual interpretation.* Rather respondent contends that petitioners should have inquired as to what the law meant. As in the *Kraus* case, the failure of the Administrator to define as an offense the act which the Prosecutor now seeks to punish was not an omission which could be cured by "interpretation." If the omission in the regulation could not have been cured by administrative interpretation, it could hardly be cured by the petitioners' failure to seek such an interpretation.

UNLAWFUL DELEGATION OF POWER TO PRIVATE INDIVIDUALS

The respondent dismisses the petitioners' contentions as to the unlawful delegation of regulatory power to private individuals with a single footnote at page 9 of respondent's brief. Respondent's footnote misses the point. It may be conceded that Congress intended to and did by law entrust to the Administrator the power to fix price ceilings and to define the commodities for which ceilings were prescribed. The point here made by

petitioners is that in describing regulated commodities only as having "their customary trade meaning" the Administrator abandoned and abdicated his function of definition to the trade at large. To paraphrase the language of *Carter v. Carter Coal Company,* 298 U.S. 238, 80 L.ed. 1160 (petitioners' brief, page 23) this Administrator in effect conferred upon the trade at large the power to regulate the affairs of an unwilling minority. One person was entrusted with the power to regulate the business of another and especially that of a competitor. It is established that "in the parlance of the trade, prepared scrap is scrap of a required condition and quality which will lie flat in the charging box *of the standard furnace designed to handle that scrap* * * * " (R. 16). It is further established that the largest of the two electric furnaces operated by the corporate petitioner has only a ten-foot diameter inner shell with a rounded bottom (R. 6) and that scrap items "to be prepared" as to the corporate petitioner's melting operations may not be more than eighteen inches in maximum dimension (R. 6-9). Accordingly, although scrap items may conform in every respect to the specifications for Grades 3 and 4, or to the specifications for Grades 11, 12, 13, 16 and 17 of CPR 5 (all the grades referred to being "prepared grades" according to the contentions of the respondent) such scrap items are nevertheless "unprepared" as to the corporate petitioner because requiring further preparation prior to use by it (R. 5-9). It is further undisputed that the needs and melting facilities of consumers of iron and steel scrap may and do differ widely (R. 5-9). Scrap items which are "unprepared" as to one consumer because requiring further prepara-

tion by him prior to use are nevertheless "prepared" as to another whose furnace may be larger or whose operational procedures may differ (R. 5-9). Should a particular consumer alter the size of his melting facilities, scrap which had theretofore been "unprepared" as to him would become "prepared" or vice versa (R. 5-9).

It is plain that the trade *in fact* had no custom at all sufficient to give the term "unprepared scrap" any definitive meaning. Even if the practices of a majority of scrap consumers were conceded to be so stabilized as to result in a "custom" among *them* as to scrap items which were deemed "unprepared" should the corporate and individual petitioners be bound by such a definition or presumed to have knowledge of it? Such an alleged "custom" could hardly be definite enough to provide the corporate petitioner, and particularly the individual petitioners, with an adequate standard properly warning them in advance of the type of purchases made criminal by the Regulation.

A case closely in point as to the practice attempted by the Administrator in CPR 5, is *State v. Crawford,* 104 Kan. 141, 177 Pac. 360, 2 A.L.R. 880. There the Legislature of the State of Kansas had provided penal sanctions to enforce its fire prevention act which required that "all electric wiring shall be in accordance with the National Electrical Code." It was shown that the National Electrical Code was promulgated by a body of private individuals and voluntary unofficial organizations which met occasionally throughout the United States. The rules were revised from time to time. It was held that the statute was an attempt to delegate the leg-

islative power of the state to private persons and it was for that reason unconstitutional and void for uncertainty. The Kansas Court said:

"But none of the cases cited has ventured so far afield as to intimate that the legislature might delegate to some unofficial organization of private persons like the National Fire Protective Association, the power to promulgate rules for the government of the people of this State, or for the management of their property, or that the legislature might prescribe punishment for breaches of these rules. We feel certain that no such judicial doctrine has ever been announced. If assent to such a doctrine could be given, the situation would arise where owners of property with considerable persistence might learn what these code rules were, and incur the expense of making their property conform thereto, only to find that the National Fire Protective Association had reconvened in Chicago, New York, or New Orleans, and had revised the Code and that the work and expense had to be undertaken anew. And there would be no end of such a state of affairs. Furthermore, there is no official way, indeed no practical way, for the average property owner to know what these code rules are. The laws of this State to which our people owe obedience must be officially published. * * * But the fallacy of such legislation in a free, enlightened and constitutionally governed state is so obvious that elaborate illustration or discussion of its infirmities is unnecessary. If the legislature desires to adopt a rule of the National Electrical Code as a law of this State, it should copy that rule, and give it a title, and an enacting clause, and pass is through the Senate and the House of Representatives by a constitutional majority, and give the Governor a chance to approve or veto it,

and then hand it over to the Secretary of State of publication."

CONCLUSION

The failure of CPR 5 to fix any adequate definition for the term "unprepared scrap" renders it invalid and unconstitutional and it is respectfully submitted that the Petition for *Writ of Certiorari* herein should be granted.

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